

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Application by)	
Qwest Communications International, Inc.)	WC Docket No. 03-90
for Authorization to Provide)	
In-Region, InterLATA Services)	
in the State of Minnesota)	

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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Minnesota PUC Comments	Comments of the Minnesota Public Utilities Commission, <i>In re: Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services In Minnesota</i> , FCC WC Docket No. 03-90 (Apr. 17, 2003).
Minnesota PUC Koppendrayer Comments	Separate Comments of Chair Leroy Koppendrayer Regarding Checklist Items #2, #14, and Public Interest Aspects of Qwest's Section 271 Filing, attached to Minnesota PUC Comments as Attach. 1.
Minnesota PUC Reha Comments	Separate Comments of Commissioner Phyllis A. Reha Regarding Checklist Items #2, #14, and Public Interest Aspects of Qwest's Section 271 Filing, attached to Minnesota PUC Comments as Attach. 2.
Minnesota PUC Scott/Johnson Comments	Separate Comments of Commissioners Gregory Scott and R. Marshall Johnson Regarding Checklist Items #2, #14, and Public Interest Aspects of Qwest's Section 271 Filing, attached to Minnesota PUC Comments as Attach. 3.

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EVALUATION OF THE
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Introduction and Summary

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996¹ (“the 1996 Act”), submits this Evaluation of the Application filed by Qwest Communications International, Inc. on March 28, 2003, to provide in-region, interLATA services in Minnesota. Qwest’s Application to the Federal Communications Commission (“FCC” or “Commission”) is its first for long distance authority in this state. It follows the FCC’s approval of Qwest’s applications for long distance authority in Colorado, Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.²

As the Department has explained, in-region, interLATA entry by a regional Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.³ Qwest’s application demonstrates that it

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

² See *FCC Qwest Multistate II Order*; *FCC Qwest Multistate I Order*.

³ See DOJ Oklahoma I Evaluation at vi-vii, 36-51.

has succeeded in opening its local markets in Minnesota in many respects. The Operations Support Systems (“OSS”) in Minnesota are the same as those reviewed and approved by the Commission in its orders pertaining to Qwest’s previous applications,⁴ and the performance data submitted in support of this application appear generally consistent with the data submitted in support of those applications.⁵ Nonetheless, three of the four participating Minnesota Public Utilities Commission (“Minnesota PUC”) Commissioners have opposed Qwest’s application based on its having entered into discriminatory interconnection agreements with certain CLECs.⁶ While the Department does not dispute the Minnesota PUC’s expert assessment of the

⁴ See *FCC Qwest Multistate I Order* ¶ 34 (“Qwest provides non-discriminatory access to its OSS”), ¶¶ 35-37 (discussing relevance of Qwest’s regionwide OSS); *FCC Qwest Multistate II Order* ¶¶ 36-38 (discussing relevance of Qwest’s regionwide OSS and prior FCC approval order). See generally Qwest Notarianni/Doherty Decl. (addressing Qwest OSS).

⁵ See Qwest Br. at 71 (“This Application makes the same showing with respect to Minnesota” that Qwest made in earlier Section 271 proceedings.). See generally Qwest Reynolds Decl. (addressing commercial performance results); *FCC Qwest Multistate I Order* Apps. B-J (listing performance results); *FCC Qwest Multistate II Order* Apps. B-E (same). Both AT&T and WorldCom have complained about excessive EDI reject rates. AT&T Finnegan Decl. ¶¶ 40-48 (noting AT&T’s reject rates rose from a range of 17-22 percent in 2002 to approximately 42 percent in February, even as volumes declined); WorldCom New Mexico/Oregon/South Dakota OSS *Ex Parte* at 2 (describing WorldCom’s reject rate of nearly 100 percent in January, reduced to 55.6 percent for the week ending April 4). Qwest’s performance data showed aggregate CLEC auto-reject rates rising from the mid-20 percent range in September through December of 2002 to 48.51 percent in January, 38.07 percent in February, and 49.16 percent in March of 2003. Qwest Performance Results *Ex Parte* at 81 (PID PO-4B-2 (LSRs Rejected for EDI – Auto-Rejected)). In its filing Qwest neither explained this result nor presented CLEC-specific performance data of the sort that have justified this Commission’s prior findings that variations in reject rates among CLECs demonstrate that Qwest’s OSS meets the requisite standards. See *FCC Qwest Multistate I Order* ¶ 89 & n.314; see also Qwest Williams Decl. ¶¶ 139-41 (providing selective reject rates for “four particular [unnamed] CLECs”). Qwest presented an explanation of the January and February results along with CLEC-specific reject and flow-through data in an *ex parte* filing on April 22. See Qwest Reject Rates *Ex Parte*. However, much of the data in the electronic spreadsheet appeared to have been obscured until Qwest filed an unfiltered version of the document a week later. Qwest Reject Rates/Spreadsheet Correction *Ex Parte* at 1 (acknowledging that “several rows and columns were not visible because a specific feature on the Excel spreadsheet had been engaged” at the time of Qwest’s April 22 filing); see also AT&T Reject Rates/Spreadsheet *Ex Parte* at 1-2 (asserting that Qwest initially provided to AT&T only a portion of the confidential data that Qwest had actually submitted in the electronic version of its April 22 *ex parte*). The Department recommends that the Commission review this and subsequent months’ performance data to ensure that Qwest’s OSS remains checklist compliant. See *FCC Qwest Multistate II Order* ¶ 55 n. 171 (noting the improvement in WorldCom’s order reject rate to 53 percent for the week beginning March 22, 2003).

⁶ See Minnesota PUC Reha Comments at 26-29; Minnesota PUC Scott/Johnson Comments at 32-37. One state commissioner was recused from the proceeding. Minnesota PUC Comments at 2.

underlying facts,⁷ it continues to defer to this Commission's prior decision regarding the relevance of these circumstances to the Section 271 process.⁸ "[A]llegations of past discrimination do not appear to implicate the Department's inquiry into whether local exchange markets are fully and irreversibly open to competition[.]"⁹ The Department therefore recommends that the Commission approve Qwest's application for long distance authority in Minnesota, if it is able to assure itself that the concerns expressed in this Evaluation have been resolved.

I. State Commission Section 271 Proceedings

The Minnesota PUC, working independently and with other state commissions, has facilitated the development of competition in its local telecommunications market.

A. Regional Oversight Committee Proceedings/OSS Test

In 1999, the Regional Oversight Committee ("ROC"), a cooperative group of state regulatory commissions in the Qwest local service region, including Minnesota, initiated a collaborative process focusing on the attainment of Section 271 authority by examining the legal framework for opening local markets, and by designing and executing a third-party OSS test.¹⁰ As explained in the Department's Qwest Multistate I Evaluation, repeated iterations of documentation, systems, and processes, and substantial retesting throughout the testing

⁷ See *FCC Qwest Multistate I Order* ¶ 491 (observing that states are "best equipped" to resolve such factual disputes).

⁸ See *id.* ¶¶ 466-91 (reviewing the allegations regarding Qwest's having entered into "secret" agreements with certain CLECs and determining that the record did "not demonstrate ongoing discrimination" or noncompliance with Section 252 that would warrant rejection of Qwest's Section 271 applications); *FCC Qwest Multistate II Order* ¶¶ 124-34 (same); see also DOJ Qwest Multistate I Evaluation at 2-5 ("[I]t is not apparent that the remedy for such prior [Section 251 or 252] violations, if any, lies in these proceedings rather than in effective enforcement through dockets in which such matters are directly under investigation.").

⁹ DOJ Qwest Multistate I Evaluation at 4; see also Minnesota PUC Unfiled Agreements Penalties Modification Order at 8-9 (explaining that statements by Eschelon and McLeod regarding the term and termination of their unfiled interconnection agreements with Qwest eliminate any "clearly defined equitable basis for the forward-looking remedy imposed" in the Minnesota PUC's initial penalty order).

¹⁰ See Qwest Stanoch Decl. ¶ 7; Qwest Notarianni/Doherty Decl. ¶¶ 18-32; see also Minnesota PUC Comments at 7-8.

conducted by KPMG, improved Qwest's OSS "to the point where only a few questions regarding their adequacy to support competitive local entry" remained when Qwest filed its first Section 271 applications.¹¹

B. Minnesota PUC Proceedings

The Minnesota PUC conducted state-specific pricing proceedings to establish unbundled network element ("UNE") rates that appear consistent with the Commission's prior analysis using the Colorado rates as benchmarks of TELRIC compliance.¹² It adopted the performance measurements and standards developed through the ROC,¹³ including the Minnesota Performance Assurance Plan ("MPAP") based on Qwest's post-entry performance assurance plan first filed in Colorado.¹⁴ It also conducted an enforcement proceeding concerning "unfiled agreements" between Qwest and certain CLECs, in which it found that the interconnection agreements should have been filed pursuant to Section 252 of the Act, that Qwest's failure to do so constituted discrimination in favor of those particular CLECs, and that financial penalties were warranted.¹⁵ Although the Minnesota PUC determined that "Qwest has satisfied 12 of the 14 Checklist Items in 47 U.S.C. § 271(c)(2)(B)," it "did not reach a collective determination with

¹¹ DOJ Qwest Multistate I Evaluation at 7-8; *see also FCC Qwest Multistate I Order* ¶¶ 9-13 (describing the development of the ROC process).

¹² Minnesota PUC Comments at 5; *see also* Qwest Thompson Decl. ¶¶ 6-20 (detailing pricing proceedings and orders).

¹³ Qwest Reynolds Decl. ¶ 22.

¹⁴ Minnesota PUC Comments at 5-6, 16; *see also* Qwest Reynolds Decl. ¶¶ 8, 11.

¹⁵ Minnesota PUC Unfiled Agreements Penalties Order at 3, 4-6, 20-22; Minnesota PUC Unfiled Agreement Penalties Modification Order at 3-4, 7-11, 12-13. *See generally FCC Qwest Multistate II Order* ¶¶ 124-42; *FCC Qwest Multistate I Order* ¶¶ 466-99; DOJ Qwest Multistate I Evaluation at 2-4; DOJ Multistate II Evaluation at 3 n.6; DOJ Multistate III Evaluation at 2 n.5.

respect to Checklist Items No. 2 and No. 14,” pertaining to unbundled network elements and resale, respectively, and “regarding public interest issues.”¹⁶

II. Entry into the Local Telecommunications Markets

In assessing whether the local markets in a state are fully and irreversibly open to competition, the Department looks first to the actual entry in a market.¹⁷ But the Department does not broadly presume that all three entry tracks – facilities-based, UNEs, and resale – are open or closed on the basis of an aggregate level of entry alone.¹⁸ The following table reports CLEC entry in Minnesota in terms of shares of total residential and business lines served and shares of residential and business lines served by each mode of entry.

¹⁶ Minnesota PUC Comments at 2; *see also* Minnesota PUC Koppendrayner Comments at 24 (asserting Qwest satisfied all checklist and public interest requirements); Minnesota PUC Reha Comments at 26-29 (asserting Qwest failed to satisfy Checklist Item 14 due to discrimination in resale terms and conditions, and “until Qwest implements the restitution [ordered by PUC in unfiled agreements proceeding], it has not leveled the competition field and has not fully addressed my concerns related to the public interest”); Minnesota PUC Scott/Johnson Comments at 32-37 (asserting Qwest failed to satisfy Checklist Item 14 due to discrimination in resale terms and conditions, failed to satisfy Checklist Item 2 due to inadequacies in its billing OSS, and that the grant of Qwest’s application is not consistent with the public interest). *See also infra* Sections III & IV.

¹⁷ *See* DOJ Pennsylvania Evaluation at 3-4 (“The Department first looks to actual competitive entry, because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry. Of course, entry barriers can differ by types of customers or geographic areas within a state, so the Department looks for evidence relevant to each market in a state.” (Footnote omitted.)).

¹⁸ *See, e.g.*, DOJ Georgia/Louisiana I Evaluation at 7 (“Although the Department presumes that fully facilities-based competition is not hindered in a competitively significant manner based on the entry recorded in Georgia, the amount of entry does not justify extending such a presumption to other modes of entry in Georgia.”); DOJ Missouri I Evaluation at 6-7 (“The Department presumes that opportunities to serve business customers by fully facilities-based carriers and resellers are available in Missouri, based on the entry efforts reflected in SBC’s application. There is significantly less competition to serve residential customers. There also is less competition by firms seeking to use UNEs, including the UNE-platform, and there are some indications that a failure by SBC to satisfy all of its obligations may have constrained this type of competition.” (Footnotes omitted.)).

CLEC Entry in Minnesota¹⁹

Total Lines²⁰		2,535,040
Total Bus. Lines		1,033,670
Total Res. Lines		1,501,370
CLEC Shares	% Total Lines	26.7
	% Total Bus.	48.3
	% Total Res.	11.9
	% Bus. Fac-B	38.9
	% Bus. UNE-P²¹	7.8
	% Bus. Resale	1.6
	% Res. Fac-B	8.3
	% Res. UNE-P²²	0.3
	% Res. Resale	3.2

Given the regional nature of Qwest's OSS, the Department evaluates entry regionwide, taking note that pricing or other state-specific factors may significantly affect the degree to which CLECs use a mode of entry in a particular state. In Minnesota, the levels of entry, the evidence from entry in other states within the region, and the absence of evidence that entry has been unduly hindered by problems with obtaining inputs from Qwest, lead the Department to conclude that opportunities are available to competing carriers serving business customers.

¹⁹ See Qwest Teitzel Decl. at 13 tbl. (line counts as of December 2002) & Ex. DLT-Track A/PI-MN-1 at 1, 4. The second three categories report CLEC lines as percentages of total lines, business lines, and residential lines, respectively; the last six categories report percentages of business and residential lines served by CLECs by means of each mode of entry, i.e., facilities-based (service via primarily a CLEC's own fiber optic network that is either connected directly to the customer premises or connected through loops leased from the BOC), UNE-platform (a combination of loop, switch, and transport elements), and resale.

Qwest offers two sets of calculations of line estimates, *see id.* ¶¶ 19-25, and, as explained previously, the Department generally relies on the E-911 database entries, *see, e.g.*, DOJ Georgia/Louisiana I Evaluation at 8 n.24; *see also* DOJ Qwest Multistate I Evaluation at 12 n.48. However, E-911 database entries understate the number of CLEC facilities-based lines because such records do not reflect lines served by independent LECs within Qwest service territory. Qwest Teitzel Decl. ¶ 21 n.22.

²⁰ Figures report total lines in Qwest's service area in this state, which has several incumbent local exchange carriers other than Qwest. *See, e.g.*, Qwest Teitzel Decl. ¶ 21.

²¹ Qwest Multistate I UNE-Platform Calculations *Ex Parte* at 1-2 (explaining estimate of business and residential line counts).

²² *Id.*

Regarding competition for residential customers, the Department finds that the facilities-based mode of entry is open in Minnesota.²³ Although there is less entry to serve residential customers via the UNE-platform, the Department does not believe there are any material obstacles to such entry created by Qwest.²⁴ The Department also concludes, due largely to the absence of CLEC complaints, that Qwest has fulfilled its obligations to open the resale mode of entry to competition in Minnesota.²⁵

III. Billing

Two of four Minnesota PUC Commissioners state that Qwest has proven that its billing accuracy is sufficient to satisfy Checklist Item 2: “The ROC OSS test and Qwest performance results conclusively establish that Qwest is meeting all Section 271 standards relating to the provisioning of DUF [daily usage files].”²⁶ The other two Minnesota PUC Commissioners participating in this proceeding state that the record “shows conclusively that UNE-Star does not meet the standards for a UNE-P offering, particularly with respect to billing accuracy,” and that

²³ In particular, Comcast’s (previously AT&T Broadband’s) cable telephony service is available to a sizable number of homes in the Twin Cities. Qwest Teitzel Decl. Ex. DLT-Track A/PI-MN-4 at 3-4.

²⁴ AT&T has raised a new claim that Qwest does not adequately provide billing completion notifiers (“BCNs”). AT&T Finnegan Decl. ¶¶ 22-39 (asserting Qwest does not provide BCNs for CLECs using EDI because it does not adequately document how CLECs can set up EDI interfaces to receive BCNs, and that Qwest may send multiple BCNs per order, thus complicating a CLEC’s assessment of when it can begin billing the end-user). Qwest admits that no CLECs are receiving BCNs via EDI. Qwest Williams Decl. ¶¶ 210-14 (stating “no CLECs currently have signed up for IMA-EDI status updates within Qwest’s 14-state territory, notwithstanding the fact that Qwest is fully able to transmit [BCNs] via IMA-EDI”); *see also* Qwest Notarianni/Doherty Decl. ¶ 512 (asserting “Qwest sends out or makes available” a BCN and to receive BCNs via EDI a CLEC must “subscribe . . . either by calling the Wholesale Systems Help Desk or through IMA-EDI certification”). The record is unclear as to whether the difficulties of which AT&T complains account for CLECs’ apparent lack of interest in receiving BCNs via EDI: AT&T’s complaint was not raised in prior Qwest Section 271 proceedings before this Commission nor was it mentioned by the ALJ in Minnesota’s Section 271 docket. *See* Minnesota ALJ OSS Report Section XIV. Nonetheless, the Department commends it to the Commission’s attention given the critical importance of timely and accurate BCNs to the CLECs’ ability to bill end-user customers. *See, e.g., FCC New Jersey Order* ¶¶ 93, 102.

²⁵ *See infra* Section IV.

²⁶ Minnesota PUC Koppendraye Comments at 21; *see also* Minnesota PUC Reha Comments at 26 (“Qwest has . . . successfully addressed the problems identified in the ALJ’s January 28, 2003 report I conclude that Qwest substantially meets the requirements of Checklist Item #2.”).

“Qwest has not shown by the preponderance of evidence that its billing accuracy in Minnesota is sufficient to support a finding of compliance with checklist item No. 2.”²⁷

Although the Minnesota ALJ’s OSS Report was issued after this Commission’s Order approving Qwest’s third multistate application, the difference in time appears to reflect a difference in process rather than in the underlying facts reviewed: Minnesota PUC Commissioners Scott and Johnson have clearly characterized their concerns regarding Qwest’s billing as related to UNE-Star,²⁸ and this Commission has already determined that these “UNE-Eschelon/UNE-Star” billing issues “appear to be disputes between the parties, and more appropriate for the interconnection dispute resolution process.”²⁹ Moreover, although Qwest’s own performance reports reflect billing inaccuracies in Minnesota,³⁰ the errors are not obviously distinguishable from the “one-time rate errors” and other misses deemed “*de minimis*” by the Commission in its prior orders.³¹

²⁷ Minnesota PUC Scott/Johnson Comments at 32-33.

²⁸ *Id.*

²⁹ *FCC Qwest Multistate I Order* ¶ 130 & n.481 (“We reject Eschelon’s numerous assertions that Qwest’s bills are not accurate.”); *see also id.* ¶ 117 (reviewing and rejecting Eschelon’s assertions of missing usage on DUF reports).

³⁰ Qwest Williams Decl. ¶¶ 204-05 (“Qwest did not meet the parity standard for [performance measure] BI-3A in any of the past four months.”).

³¹ *See, e.g., FCC Qwest Multistate I Order* ¶ 128-29 (“We are persuaded that these misses have been satisfactorily corrected and do not affect a competitive LEC’s ability to compete.”). The Department notes that Qwest still appears to have problems with implementation of BOS-BDT billing. *See generally* DOJ Qwest Multistate II Evaluation at 13-14; DOJ Qwest Multistate III Evaluation at 7-8. AT&T complains that Qwest’s bills continue to contain inaccuracies which have been unresolved for over a year and that the BOS-BDT bills have been “usually out of balance” since BOS-BDT billing was implemented, so that AT&T “must still rely on the CRIS paper bills for processing.” AT&T Finnegan Decl. ¶¶ 56-57; AT&T Billing/Reject Rates *Ex Parte* at 1-2. Qwest acknowledges that it “is continuing to work on its BOS offering and continues to implement improvements now and in the coming months.” Qwest Notarianni/Doherty Decl. ¶ 458. “The Department expects Qwest to fully support the continued development of its BOS-BDT wholesale billing system so that CLECs can receive their wholesale bills in a format consistent with that offered by other BOCs and compatible with the CLECs’ systems.” DOJ Qwest Multistate III Evaluation at 8; *see also FCC Qwest Multistate I Order* ¶ 125 (“[W]e are encouraged by Qwest’s demonstrated willingness to work collaboratively with competing LECs to produce accurate and timely BOS bills.”).

IV. Impact of Unfiled Agreements

The Minnesota PUC understandably has been troubled by Qwest's failure to file for approval various interconnection agreements between Qwest and certain CLECs. The Department commends the Minnesota PUC for its careful attention to this matter³² and does not dispute its conclusion that Qwest's failure to file these written and oral agreements was a "knowing and intentional violation" of Section 252's filing requirements and of Section 251's nondiscrimination requirements.³³ Nonetheless, the Department respectfully defers to this Commission's previous Qwest 271 orders concluding that the "record does not demonstrate ongoing discrimination"³⁴ and rejecting the argument "that Qwest currently violates section 252(a) and that approval of Qwest's joint application would be against the public interest."³⁵

The Department observed in its evaluation of Qwest's initial section 271 application that the allegations, if proven, could have justified the imposition of sanctions "including suspension or revocation of any Section 271 authority" but did not conclude that this "remedy for such prior violations" was required.³⁶ This Commission has consistently determined that Qwest's

³² See DOJ Qwest Multistate I Evaluation at 3 ("These allegations are serious and deserve the Commission's careful attention.").

³³ Minnesota PUC Unfiled Agreements Order at 4-5, 7-8.

³⁴ *FCC Qwest Multistate II Order* ¶ 124; *FCC Qwest Multistate I Order* ¶ 466.

³⁵ *FCC Qwest Multistate I Order* ¶ 490; see also *id.* ¶ 491 (rejecting "the commenters' assertion that Qwest has not filed all previously unfiled agreements with the state commissions" including "an oral agreement between Qwest and McLeod," based on Qwest's response that any agreements not filed were "expired, terminated, superseded" or otherwise did not need to be filed, and noting that "on September 16, 2002, Qwest and McLeod agreed to terminate the written contract and any and all amendments without addressing whether any such oral agreement ever existed").

³⁶ DOJ Qwest Multistate I Evaluation at 3. The Minnesota PUC has sought substantial monetary sanctions pursuant to its enforcement authority. Minnesota PUC Unfiled Agreements Penalties Order at 2-6, 20-21; Minnesota PUC Unfiled Agreements Penalties Modification Order at 4-7 (rejecting Qwest's argument that the Minnesota PUC does not have authority under state law to "correct Qwest's knowing and intentional discrimination against certain CLECs and their customers").

“knowing and intentional” violations relate to past practices and should be dealt with in separate enforcement proceedings outside the Section 271 process.³⁷

V. Conclusion

Qwest’s application demonstrates that it has succeeded in opening its local markets in Minnesota to competition in many respects. Based on this record, and subject to the

³⁷ *FCC Qwest Multistate II Order* ¶¶ 133-34 (recognizing New Mexico PUC has found Qwest to have “knowingly and intentionally” violated Section 252); *see also FCC Qwest Multistate I Order* ¶ 466 (citing Minnesota ALJ Unfiled Agreements Recommendation of September 20, 2002, and Minnesota PUC Unfiled Agreements Order of November 1, 2002), ¶ 491 (noting Minnesota PUC found that an oral agreement between Qwest and McLeod existed but had not been filed). *But see* Minnesota PUC Scott/Johnson Comments at 36 (“A denial of wrong-doing, combined with Qwest’s failure to implement the ordered remedy, makes Qwest’s conduct very much in the PRESENT, not the past.”).

Commission's assuring itself that the concerns expressed in this Evaluation have been resolved,
the Department recommends that the FCC approve Qwest's application.

Respectfully submitted,

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I hereby certify that I have caused a true and accurate copy of the foregoing Evaluation of the United States Department of Justice to be served on the persons indicated on the attached service list by first class mail, overnight mail, hand delivery, or electronic mail on May 2, 2003.

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